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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NO. 80-1037

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

vs.

ALBERT RAYMOND SILVEY, JR.,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND AFFIDAVIT IN SUPPORT THEROF

JAMES R. JENNER
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

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vs.

ALBERT RAYMOND SILVEY, JR.,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND AFFIDAVIT IN SUPPORT THEREOF

Respondent, Albert Raymond Silvey, Jr., asks leave to file the attached Opposition to Petition for Writ of Certiorari to the California Court of Appeal for the First Appellate District, Division Four without prepayment of costs and to proceed in forma pauperis pursuant to Rule 53.

The Affidavit of respondent in support of this motion is attached hereto.

DATED: 23 March 1981.

JAMES R. JENNER
PUBLIC DEFENDER

Scott Spear

Scott Spear
Assistant Public Defender

Attorney for Respondent

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OCTOBER TERM, 1980

NO. 80-1037

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

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ALBERT RAYMOND SILVEY, JR.,

Respondent.

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

I, Albert Raymond Silvey, Jr., being first duly sworn according to law, depose and say, in support of the motion for leave to proceed without being required to prepay costs or fees:

1) That I am respondent in the above-entitled action.

2) That because of my poverty I am unable to pay costs and fees required herein.

3) That I am unable to give security for the same.

4) That I am unemployed and have no money or property. I am in the custody of the Sheriff of Alameda County, California, and have been in said custody since August, 1980. I am awaiting sentence for a felony offense in Alameda County Superior Court, having been found guilty at jury trial on December 18, 1980. I am also awaiting a hearing on a petition to revoke my felony probation in a separate action in the same court. I am represented by the Alameda County Public Defender in all actions.

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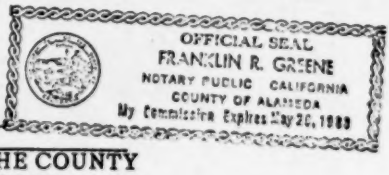
///

5) That I believe I am entitled to be heard in opposition to the petition and have in fact been requested to respond to the petition by this Court.

Albert Raymond Silvey Jr.
ALBERT RAYMOND SILVEY, JR.,
Respondent

Subscribed and sworn to before me
this 19th day of March, 1981.



Franklin R Greene
NOTARY PUBLIC IN AND FOR THE COUNTY
OF ALAMEDA, STATE OF CALIFORNIA.

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Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA, FIRST APPELLATE
DISTRICT, DIVISION FOUR

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JAMES R. JENNER
PUBLIC DEFENDER
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QUESTION PRESENTED

Does the requirement that police obtain a warrant for search of a closed container in their exclusive control depend upon whence the police originally obtained the container?

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IN THE

SUPREME COURT OF THE UNITED STATES

NO. 80-1037

OCTOBER TERM, 1980

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

vs.

ALBERT RAYMOND SILVEY, JR.,

Respondent.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Albert Raymond Silvey, Jr., respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the California Court of Appeal's decision in this case. That decision is reported at 110 Cal.App. 3d 67, 167 Cal. Rptr. 566 (1980).

JURISDICTION

Petitioner seeks to invoke this Court's jurisdiction under 28 U.S.C. section 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment IV:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

California Constitution, Article I, Section 13:

> "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable seizures and searches may not be violated; and a warrant may not issue

except on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons or things to be seized."

STATEMENT OF THE CASE

Respondent adopts petitioner's statement of the case.

STATEMENT OF FACTS

At about 2:10 a.m., March 27, 1979, Deputy David Barnhill, Alameda County Sheriff's Department, accompanied by Deputy Curran, was on patrol in the area of Mission and Grove Street, in an unincorporated portion of Hayward (PHT 2, 25, 28).[1/] It was raining (PHT 30). He followed a 1964 Cadillac for a mile, paced it at 45 miles per hour in a 35 mph zone, noticed that though it drove in a straight line it also wove from side to side inside the lane and that at one point it rode for about 75 yards on the bot dots (PHT 3). He turned on his patrol car's emergency lights at A and Mission, and the Cadillac stopped at C and Mission (PHT 4).

Deputy Barnhill approached the Cadillac; the driver was respondent Albert Silvey (PHT 4-5). Protruding from a section of the dashboard the deputy saw a yellow metal roach clip (PHT 4).

Deputy Barnhill observed the following about Mr. Silvey: Mr. Silvey's movements when trying to retrieve his driver's license were slow and jerky, and he kept passing over the license. His joints seemed stiff. His eyes were droppy and bloodshot and exhibited nystagmic motion. There were cakes of saliva at the corners of his mouth. There were no alcoholic beverage odors on his breath (PHT 5-7).

Based on those observations, Deputy Barnhill determined that Mr. Silvey was under the influence of PCP, and he ordered him out of the Cadillac, placed him under arrest, handcuffed him and

---

1. "PHT" refers to the Transcript of the Preliminary Hearing held on May 16, 1979.

placed him in the front seat of the patrol car (PHT 7-8).

At the point when Deputy Barnhill told Mr. Silvey to get out of the Cadillac, he observed Mr. Silvey remove something from the center armrest and stick it in the back of his pants. When Mr. Silvey got out of the car, Deputy Barnhill retrieved the object, because he did not know what it was. He handed it to Deputy Curran. After handcuffing Mr. Silvey and putting him in the patrol car, he returned to the object (PHT 7-8).

The object was a closed metal container. Deputy Barnhill did not know what it was (PHT 29-30). He opened it and took out the contents, which were one handrolled cigarette and three white balls wrapped in plastic (PHT 8-9). Analysis showed these contents to contain PCP (PHT 35).

Deputy Barnhill searched Mr. Silvey and found a bag of leafy material in a pocket (PHT 13). It was not analyzed (PHT 36).

There was no warrant (Entire record).

Sergeant James Rose, Alameda County Sheriff's Department, qualified as an expert on possession purposes, opined that the three white balls were possessed for sale (PHT 37-46).

In regard to Deputy Barnhill's training and experience in recognizing PCP symptoms, he testified that he'd had 30 hours of instruction at the academy on all aspects of all illegal drugs, three hours overall of on-duty training on recognizing the substance PCP and the symptoms of its influence, that he'd read six to nine handouts on PCP symptoms, all of them repetitive of one another, and he'd made six arrests of people for being under the influence of PCP, some of whom exhibited the symptoms he'd been told of. Those symptoms are droopy and varyingly bloodshot eyes, possibly having a nystagmic movement, stiff joints, slow and jerky motions, sometimes muscle spasms, slightly medicated breath odor, sometimes abrasive and assaultive behavior. He'd learned that the objective symptoms could be very different from one person to

another but that invariably there are jerky motions, stiff joints, medicated breath odor, and nystagmic eye movement (PHT 17-22).

REASONS FOR DENYING THE WRIT

I.

THE DECISION OF THE CALIFORNIA COURT OF APPEAL IS CORRECT.

A. The requirement that a warrant is required for the search of a closed container once it has been reduced to the exclusive control of the police does not depend upon whence the police recovered the container.

When respondent was ordered out of his car, he took the closed metal container from the armrest glove compartment and had it momentarily under his immediate control before the officer seized it. Later, when the officer searched it, it was at that point under the officer's exclusive control. Petitioner contends that since the container was for a moment under the arrestee's control, a warrant was not required at any time for the search.

This Court has held that "...warrantless searches of other property seized at the time of an arrest cannot be justified as incident to that arrest if...no exigency exists. Once law enforcement officers have reduced luggage or other personal property not immediately associated with the person of the arrestee to their exclusive control, and there is no longer any danger that the arrestee might gain access to the property to seize a weapon or destroy evidence, a search of that property is no longer an incident of the arrest." United States v. Chadwick, 433 U.S. 1, 15 (1977).

Whether the container is in an auto or is taken from the possession of the arrestee does not make any difference:

> "It is clear from Chadwick itself that the tote bag would not have been subject to a warrantless search if appellant had been arrested on the street and the bag taken from his possession." People v. Minjares, 24 Cal.3d 410, 419-420, 153 Cal.Rptr. 224, 591 P.2d 514, cert. denied, 444 U.S. 887 (1979).

See also Arkansas v. Sanders, 442 U.S. 753, 766-768 (1979) (Burger, C. J., concurring).

This Court stressed in Arkansas v. Sanders, 442 U.S. 753 (1979), that the exigency which allows a warrantless search of a container is to be determined at the time the search is made, not the point when the container is seized:

> "...the exigency of mobility must be assessed at the point immediately before the search--after the police have seized the object to be searched and have it securely within their control. See 433 U.S., at 13. Once police have seized a suitcase, as they did here, the extent of its mobility is in no way affected by the place from which it was taken." Arkansas v. Sanders, supra, 442 U.S. at 763 (emphasis added; footnotes omitted).

Petitioner contends that a number of cases have ruled that a container taken from an arrestee may be searched without a warrant, even though in the exclusive control of the police, while another number of cases holds otherwise. Petitioner's Brief, pp. 9-10. This posits a conflict which does not in fact exist. One group of cases cited by petitioner approves warrantless searches of containers which were still within reach of the arrestee and not in the exclusive control of the police: United States v. Garcia, 605 F.2d 349 (7th Cir. 1979); People v. Flores, 100 Cal. App.3d 221, 160 Cal.Rptr. 839 (1980); Dawson v. State, 40 Md.App. 640, 395 A.2d 160 (1978); People v. De Santis, 46 N.Y.2d 82, 385 N.E.2d 577, 412 N.Y.S. 2d 838 (1978). This was also the case in United States v. Robinson, 414 U.S. 218 (1973), in which the issue was whether a traffic arrestee's pockets could be searched at all, not whether containers taken from his control could be searched without a warrant later. The justification for these warrantless searches is the protection of the officer and to prevent destruction of evidence. United States v. Robinson, supra, 414 U.S. at 226.

The other group of cases concerned the searches of

wallets and purses. United States v. Ziller, 623 F.2d 562 (9th Cir. 1980); United States v. Castro, 596 F.2d 674 (5th Cir. 1979); United States v. Berry, 560 F.2d 861, 864 (7th Cir. 1977)(dictum); People v. Harris, 105 Cal.App.3d 204, 164 Cal.Rptr. 296 (1980). The courts allow warrantless searches of wallets and purses in these cases because such a container is "an extension of a person," People v. Harris, supra, 105 Cal.App.3d at 216. It is "an element of his clothing..." United States v. Passaro, 624 F.2d 938, 944 (9th Cir. 1980). But see United States v. Marchand, 564 F.2d 983 (2nd Cir. 1977). A search of this special category of containers is distinguished from a search of a container "within the arrestee's immediate control." The latter requires a warrant once it is in the exclusive control of the police. United States v. Berry, supra, 560 F.2d at 864.

In United States v. Chadwick, supra, the two co-defendants were sitting on the footlocker. Machado and Chadwick, and an attendant, lifted the footlocker into the trunk of Chadwick's car. At that point, with the trunk still open and before the car started, the arrest took place. But the fact that the locker at that point was within the reach of two arrestees or that they had been sitting on it did not justify the search of the locker later when it was within the officers' exclusive control. The reason is simple: at the time of the actual search, there was no danger that the arrestee could seize a weapon or destory evidence. Chadwick was thus an elucidation of the opinion in Chimel v. California, 395 U.S. 752 (1969), in which Justice Frankfurter's dissent in United States v. Rabinowitz, 339 U.S. 56 (1950), - cited at United States v. Chadwick, p. 8 - was recognized as the basic statement of the law regarding search incident to arrest:

> "What, then, is the exception to the prohibition by the Fourth Amendment of search without a warrant in case of a legal arrest...? ...Its basic roots...lie in necessity. What is the necessity? Why is search of the arrested person

> permitted? For two reasons: First, in order to protect the arresting officer and to deprive the prisoner of potential means of escape, and, secondly, to avoid destruction of evidence by the arrested person." United States v. Rabinowitz, 72, (Franfurter dissenting). (Citations omitted.)

If the necessity - the exigency - is not present, then a warrant is required, as the search is no longer a search incident to the arrest.

> B. Whether the container is one which is in itself constitutionally protected is an issue which was not raised timely below; this Court may not therefore consider it.

Petitioner hints obliquely that the container here is not such that it is in any case constitutionally protected. Petitioner's Brief, p. 13. This contention was never tendered to the trial court or the Court of Appeal and this Court is therefore without jurisdiction to consider the arguments - if indeed the petitioner is raising the issue here.

So far as the trial court and the Court of Appeal were concerned, the container was a "closed metal container." Neither the container itself nor evidence of its specific nature were provided to the trial court or the Court of Appeal. In a question it was alluded to as a candy can. In a publication of the Alameda County District Attorney, it is referred to as a "metal film can." 11 Point of View 56, 80 (Fall, 1980). The California Attorney General has conceded that a cookie tin is a container for which a warrant is required, in People v. Robbins, 103 Cal.App.3d 34, 39, 162 Cal.Rptr. 780 (1980), cert. granted sub nom. Robbins v. California, ___ U.S. ___, No. 80-148 (October Term, 1980).

In California, issues not tendered to the trial court will not be reached on appeal (see numerous cases cited in 6 Witkin, California Procedure (2nd Ed.), Appeal § 276 at pp. 4264-5 (1971) and issues never presented to the Court of Appeal will not be examined by the California Supreme Court on petition for hear-

ing. (Calif. Rule of Court 29(b).)[2/]

Since the (possibly) raised issue of whether the container is in itself protected by the warrant requirement was not "specially set up or claimed under the constitution" within the meaning of 28 U.S.C. section 1257(3), this Court is without jurisdiction to entertain it on petition for certiorari. (See Central Union Telephone Co. v. Edwardsville, 269 U.S. 190, 194-5 (1925).

That particular issue is before this Court in a case in which it was raised and argued below and in which the record is such that the Court is not left in the dark as it would be by the inadequate record of this case - namely, in Robbins v. California, supra, in which this Court has granted certiorari.

II.

THE PRESENT CASE IS NOT PROPERLY BEFORE THIS COURT BECAUSE IT DOES NOT CLEARLY PRESENT A FEDERAL QUESTION.

In finding that the search in the present case was unlawful, the California Court of Appeal cited not only this Court's decisions in Arkansas v. Sanders, supra, and United States v. Chadwick, supra, but those of the California Supreme Court in People v. Minjares, supra, and People v. Dalton, 24 Cal.3d 850, 157 Cal. Rptr. 497, 598 P.2d 467, cert. den., ___ U.S. ___, 63 L.Ed.2d 781, 100 S.Ct. 1345 (1979). While the latter mentions the Fourth Amendment, it also cites Badillo v. Superior Court, 46 Cal.2d 269, 294 P.2d 23 (1956), a case relying on People v. Cahan, 44 Cal.2d 434, 282 P.2d 905 (1955), which rested on the California Constitution's independent prohibition of unlawful searches. The California Supreme Court has remarked that most search and seizure cases

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2. Rule 29(b): "On petition for hearing the Supreme Court will not examine the record for error unless the petition shows that substantial issues of law or fact were incorrectly stated or were not considered in the opinion of the Court of Appeal and that such issues were raised in the briefs and set forth in a petition for rehearing in the Court of Appeal." There was no petition for rehearing in the Court of Appeal in this case.

decided by California courts are based upon both federal and state grounds and that both state and federal constitutional guarantees are often referred to, for the sake of convenience, under the rubric of "Fourth Amendment" rights. People v. Triggs, 8 Cal.3d 884, 891-2, fn. 5, 106 Cal.Rptr. 408, 506 P.2d 232 (1973).

That makes it difficult to determine whether this case was decided on state law grounds. The uncertainty is clarified by the dissent, though, which shows that the California Constitution guarantees were relied upon. People v. Silvey, supra, 110 Cal.App.3d at 73 (Christian, J., dissenting). If there is any further uncertainty on this score, at most the present case should be returned to the California Court of Appeal so that it may clarify whether its decision is grounded on federal or state constitutional grounds, or both. California v. Krivda, 409 U.S. 33 (1972).

If respondent is correct that this case was decided on state constitutional grounds, then it would be inappropriate for this Court to grant certiorari review. See Jankovich v. Toll Road Comm'n., 379 U.S. 487, 489 (1964).

CONCLUSION

For the reasons stated herein, respondent respectfully urges that this Court deny the petition for a writ of certiorari.

DATED: March 23, 1981

Respectfully submitted,

JAMES R. JENNER
PUBLIC DEFENDER

Scott Spear

Scott Spear
Assistant Public Defender

UNITED STATES SUPREME COURT

OCTOBER TERM, 1980

NO. 80-1037

PEOPLE OF THE STATE OF CALIFORNIA, Petitioner, vs. ALBERT RAYMOND SILVEY, JR., Respondent.	)

DECLARATION OF SERVICE BY MAIL

The undersigned deposes and says:

That I am a citizen of the United States and a resident of the County of Alameda; that I am over the age of 18 years and not a party to the above mentioned actipn; that my business address is the Office of the Public Defender, Alameda County Courthouse, 1225 Fallon Street, Oakland, CA 94612.

That I served a true copy of the attached Opposition to Petition for Writ of Certiorari on each of the following, by placing same in envelopes addressed respectively as follows:

George M. Deukmejian
Attorney General of the State of California
6000 State Building
San Francisco, California 94102

D. Lowell Jensen
District Attorney, Alameda County
1225 Fallon Street
Oakland, California 94612

Rene C. Davidson
County Clerk, Alameda County
1225 Fallon Street
Oakland, California 94612

Clerk, California Court of Appeal
First Appellate District, Division Four
350 McAllister Street
San Francisco, California 94102

Said envelopes sealed and deposited in the United States Mail at Oakland, California, with postage thereon fully prepaid.

Myra H. Evans